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SUPREME COURT OF FLORIDA

78272

CASE NO. ~~78,313~~
DISTRICT COURT OF APPEAL
FIRST DISTRICT NO. 90-2796

CLYDE TIMMONS,
Petitioner,

v.

BONNIE S. COMBS,
Respondent

RESPONDENT'S BRIEF ON JURISDICTION

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Other citations:

Section 45.062, Florida Statutes (1987)
 Section 768.79, Florida Statutes (1987)
 Rule 1.442, Florida Rules of Civil Procedure
 Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate
 Procedure

ARGUMENT ON DISCRETIONARY JURISDICTION

STATING THE POINT TO MORE PRECISELY REFLECT THE CURRENT STATUS OF APPELLATE DECISIONAL LAW IN THE STATE OF FLORIDA ON SECTION 45.061, FLORIDA STATUTES, THE DECISION OF THE THIRD DISTRICT COURT, STATE OF FLORIDA, IN MEMORIAL SALES, INC. ET AL. v. PIKE, 16 F.L.W. D1235 (Opinion filed May 7, 1991) IS IN CONFLICT WITH THE DECISIONS OF THE OTHER FLORIDA DISTRICT COURTS OF APPEAL IN THE CONSTRUCTION AND APPLICATION OF THAT STATUTE.

At the time this cause arose in the trial court (and at the present time), there were three provisions by which a party might make an offer of settlement or judgment to his adversary which, if refused and if certain circumstances thereafter came into being, might entitle the offeror to an award of attorneys' fees against the non-accepting offeree. Those provisions were Rule 1.442, Florida Rules of Civil Procedure, as promulgated by this Court, Section 768.79, Florida Statutes (1987), and Section 45.061, Florida Statutes (1987).

The decision law on Rule 1.442 was that, for the Defendant to be entitled to attorneys' fees for failure of the Plaintiff to accept an offer the Plaintiff had to recover judgment in favor of Plaintiff. B & H CONSTRUCTION v TALLAHASSEE COMMUNITY COLLEGE, 542 So.2d 382 (Fla. 1st DCA, 1989), following the United States Supreme Court's construction of it's similar provision in the Federal Rules of Civil Procedure.

The decisional law on Section 768.79, Florida Statutes

(1987) was and is that expressly required a judgment in favor of Plaintiff to enable Defendant to recover attorneys' fees. RABATIE v U.S. SECURITY INS. CO., 14 F.L.W. 1753 (Fla. 3rd DCA, July, 1989), Rev'd on other grounds, 15 F.L.W. 2590 (October, 1990); MAKAR v INVESTORS REAL ESTATE MANAGEMENT, INC., 553 So.2d 298 (Fla. 1st DCA, 1989); KLINE v. PUBLIX SUPERMARKETS, INC., 15 F.L.W. 1320 (Fla. 2nd DCA, May, 1990) (In addition the First District Court of Appeal has recently held that Section unconstitutional with the question certified to this Court. McHUGHES v GOOLSBY, 16 F.L.W. D906 (April 4, 1991).

With regard to Section 45.061, Florida Statutes (1987), the statute sought here to be reviewed, the decisional law was in conformity with the construction of the above two cited provisions; that is, that it required Plaintiff to recover judgment to authorize Defendant to seek attorneys' fees for non-acceptance of an offer of settlement. COE v B & D TRANSPORTATION SERVICES, INC., 561 so.2d, 469 (Fla. 2nd DCA, 1990); NORRIS & ASSOCIATES OF NAPLES, INC. v ELKINS, 15 F.L.W. D3004 (Fla. 2nd DCA, December 14, 1990) and the instant case of TIMMONS v COMBS (opinion filed May 14, 1991). Additionally, in MILTON v. LEAPI, 562 So.2d 804 (Fla. 5th DCA, 1990), the Fifth District had declared Section 45.061 as an unconstitutional legislative infringement on the rule making authority of this Court.

The decisional conflict, as such, arises as follows:
In MEMORIAL SALES, INC. v PIKE, 16 F.L.W. D1235 (Fla. 3rd DCA, May 7, 1991), the Third District, without giving us the benefit of it's rationale for it's interpretation of Section 45.061, and without recognizing decisional conflict with its sister courts, held in that case that the prevailing defendant was entitled to attorneys' fee under that section against the Plaintiff who had suffered an adverse directed verdict at the hands of the trial court. Then the Second District, in the case of WESTOVER v ALLSTATE INSURANCE COMPANY, 16 F.L.W. D1724 (Fla. 2nd DCA, June 26, 1991), adhering to it's decisions in COE and NORRIS, supra, again held that Section 45.061, Florida Statutes, required that the Plaintiff obtain judgment to enable defendant to seek sanctions of attorneys' fees, but in concluding it's opinion stated:

"We certify that our holding in this case brings us in direct conflict with the Third District insofar as Section 45.061 is concerned. In Memorial Sales, Inc. v. Pike, 16 F.L.W. D1235 (Fla. 3rd DCA, May 7, 1991), the Third District held that Section 45.061 does not require the entry of a judgment in favor of the plaintiff before the defendant may seek sanctions for the refusal of the offer." (16 F.L.W. at D1724)

So it is the Second District who has recognized conflict concerning Section 45.061, with the single decision issued by the Third District in WESTOVER. Whether the apparent conflict of the decision of the Third District with

the opinions of the Second District, the Fifth District and the First District (in the instant case), is one expressly and directly conflicting sufficient for this Court to invoke it's discretionary jurisdiction under Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, has eluded this writer's research of the decisional law concerning the criteria guiding this Court as to whether the "discretionary" element has been sufficiently removed to require this Court's review of the instant decision. Therefore, Respondent can offer no further guidance to this Court on the Petition for Discretionary Review sought by the Petitioner/Appellant, CLYDE TIMMONS.

CONCLUSION

From the analysis above given it is apparent, from an undetermined rationale, that the Third District Court of Appeal is in conflict with three of it's sister District Courts in it's application of the sanctions of Section 45.061 in awarding attorneys' fees to a defendant against a non-prevailing plaintiff. The Respondent can only conclude her argument by saying the question of whether the gravity of the matter requires the invocation of the discretionary review jurisdiction of this Court rests with the collective wisdom of it's members and Respondent can be of no assistance in that regard.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Brief on Jurisdiction has been furnished by mail delivery, this 7th day of August, 1991, to THOMAS J. KENNON, III, ESQUIRE, Attorney for Petitioner, Post Office Drawer 1707, Lake City, Florida 32056-1707.



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